

STATE OF MICHIGAN
SUPREME COURT OF MICHIGAN

TERRY E. THOMAS,
Plaintiff,

Supreme Court No.

vs.

GRAND TRUNK WESTERN RAILROAD
INC., a successor by assignment to
GRAND TRUNK WESTERN RAILROAD
COMPANY, a corporation,
Defendant.

Court of Appeals Case No. 244246
Lower Court: Wayne County
Lower Court Case No. 98-839019-NO
Lower Court Hon. John A. Murphy

GRAND TRUNK WESTERN RAILROAD, INC.,
Plaintiff/Appellee,

vs.

AUTO WAREHOUSING COMPANY,
Defendant/Appellant.

CA 244246 Opn 6/10/04
Lower Court: Wayne County
Lower Court Case No. 00-17068 CK
Lower Court Hon. John A. Murphy

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**DEFENDANT AUTO WAREHOUSING COMPANY'S
APPLICATION FOR LEAVE TO APPEAL**

NOW COMES Defendant Auto Warehousing Company, by and through its counsel, Potter, DeAgostino, Campbell & O'Dea, and seek leave to appeal the Michigan Court of Appeals' Opinion in the above matter released on June 10, 2004. Defendant Auto Warehousing Company requests that this Court reverse the Court of Appeals' Opinion finding no triable issue of fact regarding the

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CORBIN R. DAVIS
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MICHIGAN SUPREME COURT

reasonableness of the allocation of the settlement by Plaintiff Grand Trunk Western Railroad, Inc., and remand the issue regarding the reasonableness of the settlement to the Wayne County Circuit Court for trial on that issue.

Respectfully submitted,

POTTER, DeAGOSTINO, CAMPBELL & O'DEA

A handwritten signature in black ink, appearing to read "S.M. Potter", is written over a horizontal line.

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Dated: July 21, 2004

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STATEMENT OF QUESTION INVOLVED

- I. WHETHER THE COURT OF APPEALS ERRED IN CONCLUDING THAT DEFENDANT AUTO WAREHOUSING COMPANY FAILED TO RAISE A TRIABLE ISSUE OF FACT REGARDING THE REASONABLENESS OF PLAINTIFF GRAND TRUNK WESTERN RAILROAD'S ALLOCATION OF IT'S SETTLEMENT WITH TERRY THOMAS, WHEN THE ISSUE WAS NEVER ADDRESSED BY THE TRIAL COURT?**

Defendant Auto Warehousing Company answers "Yes."

Plaintiff answers "No."

The Court of Appeals answered "No."

STATEMENT OF FACTS

I. PROCEDURAL HISTORY

The action before this Court is a breach of contract action for indemnity brought by Plaintiff/Appellee Grand Trunk Western Railroad (Plaintiff) against Defendant/Appellant Auto Warehousing Company (Defendant). In its Complaint, Plaintiff alleges that Defendant breached a lease agreement between the parties by failing to indemnify Plaintiff pursuant to two indemnity clauses contained within the lease agreement.

The underlying litigation that generated Plaintiff's claim for indemnity was filed by Terry Thomas against Plaintiff, his employer. Terry Thomas was employed as a brakeman/conductor by Plaintiff. On December 29, 1997, while working as a conductor, Mr. Thomas was injured while in the course of his employment with Plaintiff. Mr. Thomas was off work or worked light duty over the next year due to these injuries. On December 7, 1998, Mr. Thomas filed a lawsuit in the Wayne County Circuit Court (case number 98-839019) against Grand Trunk Railroad seeking damages for injuries arising out of the December 29, 1997 accident. This claim was brought pursuant to the Federal Employer Liabilities Act, Title 45 U.S. Code Section 51-60 (FELA). The December 7, 1998 incident did not involve the premises leased by Defendant from Plaintiff and Plaintiff does not claim that Defendant owes any indemnity for the injuries suffered in the December 7, 1998 incident.

Mr. Thomas returned to light duty work in December of 1998. On January 11, 1999, he was again injured in an on the job accident. The second accident allegedly involved a slip and fall in snow while attempting to clean railroad switches so that rail cars could be moved through the yard. On August 6, 1999, Mr. Thomas filed an Amended Complaint which added a count seeking damages

for injuries arising out of the January 11, 1999 accident (Exhibit A, Thomas' First Amended Complaint). Mr. Thomas's new count was also brought under FELA.

On February 8, 2000, Grand Trunk tendered its defense to Count II of Mr. Thomas's Amended Complaint to Auto Warehousing (Exhibit B). Plaintiff's tender of its defense is limited to Count II, the January 11, 1999 incident, and there is no claim that Defendant owes indemnity to Plaintiff for damages arising out of Count I, the December 29, 1997 incident. Defendant declined to accept this tender.

On May 26, 2000, Plaintiff filed this breach of contract action against Defendant seeking to enforce the provisions of the indemnity clause (Exhibit C, Grand Trunk's Complaint). On March 5, 2001, this action was consolidated with Mr. Thomas's underlying action pursuant to order of the Honorable John Murphy (Exhibit D). On May 24, 2001, Plaintiff brought a Motion for Summary Disposition as to liability only against Defendant. In this Motion Plaintiff asked the trial court to order Defendant to indemnify Plaintiff from and against all claims for damages by Mr. Thomas against Plaintiff arising out of the January 11, 1999 incident and requested that Defendant pay Plaintiff's cost of defense from the date of the tender of defense (February 8, 2000) to the date of any settlement or judgment on Mr. Thomas's claim. Auto Warehousing filed its response to this Motion on July 5, 2001.

After Plaintiff filed its Motion for Summary Disposition, the trial court scheduled a facilitation/mediation in both cases for May 29, 2001. Plaintiff's contract claim for indemnity was discussed first. The claim was not resolved because Defendant refused to accept Plaintiff's tender of defense for Count II of Mr. Thomas's action. Defendant offered to contribute \$50,000 towards settlement of Count II, but Plaintiff rejected this settlement. At that time, the positions of the parties

were memorialized in a document entitled Facilitation Resolution as to Grand Trunk Western Railroad, Inc., and Auto Warehousing Company. This document was signed by both parties and the facilitator, Honorable Michael L. Stacey, and is attached as Exhibit E.

Immediately thereafter, Plaintiff settled both of Mr. Thomas's claims in the amount of \$725,000. Of this settlement, \$625,000 was deemed to be in settlement of Count II, the January 11, 1999 incident, and \$100,000 was allocated to settle Count I, the December 29, 1997 fall. This settlement agreement is memorialized in a document entitled Independent Facilitation/Facilitative Mediation Settlement which is attached as Exhibit F.

On September 20, 2001, after settlement of Mr. Thomas's claims, Plaintiff filed an Amended Motion for Summary Disposition seeking indemnity from Defendant for the \$625,000 paid in settlement of Count II of Mr. Thomas's First Amended Complaint, as well as all costs and attorney fees incurred in defending that action. On November 13, 2001, Defendant filed its Response to Plaintiff's Amended Motion for Summary Disposition. Oral argument on Plaintiff's amended motion was held on January 18, 2002 (Exhibit G, Transcript from Motion Hearing, January 18, 2002). On February 22, 2002, the trial court, through the Honorable John A. Murphy, filed its Opinion Granting Plaintiff's Motion for Summary Disposition (Exhibit H, Opinion Granting Plaintiff's Motion for Summary Disposition). Despite its prior conclusions that Defendant's obligation to indemnify Plaintiff under Paragraphs 10 and 19 of the Lease was unresolved due to questions of fact, the court held that the issue could not be resolved by the trier of fact. The court found that Defendant could not contest whether or not indemnity was owed or in what amount¹

¹ The trial court opinion incorrectly refers to the settlement amount as \$650,000 in this part of the opinion.

because Defendant refused Plaintiff's tender of defense. **The trial court never addressed the issue of whether or not Plaintiff's allocation of the settlement amount was reasonable and never considered the direct medical evidence presented by Defendant.** Without any determination that the indemnity provisions of the contract applied or that the allocation of the settlement was reasonable, the court stated that Defendant "breached the lease agreement's provision that 'upon tender of the defense of such claims by Lessor, Lessee shall undertake the defense of the Lessor at Lessee's sole cost and expense, including attorneys fees and costs.'" (Exhibit H, p. 16). Based on the court's opinion that Defendant breached the duty to defend, the court held Defendant could not contest the amount of the settlement allocated to the January 11, 1999 incident (Exhibit H, p. 16).

On June 21, 2002, the trial court entered an order entitled Amended Summary Judgment ordering Defendant to indemnify Plaintiff for the \$625,000 paid by Plaintiff to Mr. Thomas in settlement of Count II of Mr. Thomas's Complaint (Exhibit I, Amended Summary Judgment). On September 18, 2002 the trial court entered an order entitled Order of Dismissal of Claims of Terry Thomas Against Grand Trunk Western Railroad, Inc., Only.

Defendant filed its claim of appeal regarding the grant of summary disposition on October 8, 2002. The court of appeals issued its Opinion on June 10, 2004 (Exhibit J, Court of Appeals Opinion). The court of appeals affirmed the trial court's grant of summary disposition, although for reasons different from those relied on by the trial court. The court of appeals held that the trial court erred in holding Defendant to the same standard as an insurance company with regard to Defendant's contractual duty to defend (Exhibit J, p. 4). However, the court of appeals affirmed the grant of summary disposition based on Plaintiff's potential liability under FELA and evidence that the settlement was reasonable (Exhibit J, p. 5). The court of appeals determined that Defendant failed

to produce evidence that the underlying suit would have been successfully defended and, therefore, did not create a question of fact regarding Plaintiff's potential liability (Exhibit J, p. 8). **The court of appeals further held that the allocation of \$625,000 for the 1999 accident and \$100,000 for the 1997 accident was reasonable based on a note on the facilitator's report (Exhibit F) stating "Mediator [facilitator] agrees that this settlement is reasonable," and, evidence from Mr. Thomas' economic expert regarding the wage loss he attributed to the 1997 accident (Exhibit J, p. 9). This issue was never addressed by the trial court due to its erroneous ruling regarding Defendant's duty to defend.** Despite the fact that the issue was never addressed by the trial court, the court of appeals weighed the evidence presented to the trial court and upheld the grant of summary disposition. With regard to Defendant's position that the allocation of damages between the two incidents is a question of fact, the court of appeals stated "[a]lthough defendant argues a contrary view of allocation based on the nature of Thomas' injuries, defendant's arguments do not raise a triable issue of fact whether the settlement was reasonable" (Exhibit J, p. 9).

Justice Wilder filed a separate opinion concurring in part and dissenting in part. Justice Wilder agreed with the majority that Defendant could not challenge Plaintiff's potential liability to Thomas for his 1999 injuries, but concluded that **Defendant "has raised a triable issue of fact regarding the reasonableness of the settlement amount allocated to each claim of injury that precludes summary disposition"** (Exhibit J, Wilder concurring in part and dissenting in part, p. 1). Justice Wilder pointed to direct evidence offered by Defendant regarding Thomas' injuries and his ability to recover from his injuries to contradict the opinion of the facilitator and Thomas' economic expert. *Id.* Defendant now seeks to appeal the determination that Defendant's presentation of medical testimony regarding the severity of Mr. Thomas' 1999 injuries compared to the severity of

his 1997 injuries did not raise a question of fact regarding the reasonableness of Plaintiff's allocation of the settlement.

II. MR. THOMAS'S INJURIES

In order to understand the issue to be resolved by this appeal, it is necessary to understand the injuries suffered by Mr Thomas as a result of the incident that occurred on December 29, 1997 and the injuries alleged to result from the January 11, 1999 incident. **It must be remembered that Plaintiff has asserted no claim of indemnity with regard to the injuries suffered as a result of the December 29, 1997 incident.**

Terry Thomas was employed as a brakeman/conductor by Defendant. On December 29, 1997, while working as a conductor, Mr. Thomas injured his right shoulder (rotator cuff) and left knee (cartilage injury). Medical testimony in this matter demonstrates that the injuries suffered in 1997 resulted in permanent restrictions. Dr. Joseph Weiss first saw Mr. Thomas on November 17, 1998 for an evaluation of the right shoulder and left knee (Exhibit K, Deposition of Joseph Weiss, M.D., pp. 8-10). Dr. Weiss noted that Mr. Thomas's torn right rotator cuff had been surgically repaired in May of 1998 by Dr. MacNamee (Exhibit K, p. 10). He also noted that Mr. Thomas underwent surgery in January 1998 to his left knee to repair cartilage damage to the knee (Exhibit K, p. 11). At the time of the evaluation in November 1998, Dr. Weiss restricted Mr. Thomas from lifting greater than 25 pounds, from work involving the right shoulder above shoulder height, and from activities involving the shoulder with physical exertion greater than 15 minutes at a time (Exhibit K, p. 12). Dr. Weiss released Mr. Thomas for work consistent with his restrictions in December 1998 and scheduled him for a reevaluation in six weeks (Exhibit K, p. 15). Dr. Weiss

testified that the reason he scheduled a reevaluation was because he had some question as to whether Mr. Thomas would be able to handle his duties as a railroad worker (Exhibit K, p. 15).

Dr. Weiss also saw Mr. Thomas after the incident on January 11, 1999. Mr. Thomas injured his right knee (cartilage injury) and left shoulder (bone spurs) in this slip and fall. Mr. Thomas allegedly sustained the same injuries as in the 1997 incident but to the opposite knee and shoulder. At no time did Mr. Thomas indicate that he injured his right shoulder or left knee when he fell in January, 1999 (Exhibit K, p. 25). When he saw Mr. Thomas after the January 1999 incident, it was Dr. Weiss's impression that Mr. Thomas was frustrated over his previous injury to his right shoulder and his recent injury to his right knee and left shoulder. Mr. Thomas also indicated that his employer was not cooperative with his attempts to resume work activity and that he was required to walk long distances in the snow on his injured left knee (Exhibit K, p. 20). Dr. Weiss again saw Mr. Thomas in March of 1999 and at that time he disabled Mr. Thomas from all railroad activity because of **his bilateral rotator-cuff tears** (Exhibit K, pp. 22-23). Dr. Weiss also noted in March of 1999 that Mr. Thomas was experiencing more pain in his right shoulder than his left and that the pain in his right shoulder was worse than ever before (Exhibit K, pp. 22-23). Dr. Weiss attributed these complaints to a recurrent tear in the supraspinatus muscle, which is one of four muscles in the rotator cuff groove (Exhibit K, p. 23). Mr. Thomas informed Dr. Weiss that he has had persistent pain in his right shoulder ever since trying to return to work in December 1998 (Exhibit K, p. 41). **Finally, Dr. Weiss testified that he could not state that the injuries suffered by Mr. Thomas in January 1999 would have prevented him from returning to work as a railroad conductor** (Exhibit K, p. 42).

Dr. Leonard Pickering is an orthopedic surgeon that treated Mr. Thomas for his knee injuries. At the time Dr. Pickering first met with Mr. Thomas, Mr. Thomas had already had an arthroscopic procedure done to his left knee by Dr. MacNamee for the injuries Mr. Thomas suffered in 1997. Mr. Thomas did not indicate to Dr. Pickering that he injured his left knee in the incident that occurred in January 1999 (Exhibit L, Deposition of Leonard Pickering, M.D., p. 15). Dr. Pickering first performed an arthroscopic procedure on Mr. Thomas's right knee, injured in January 1999 (Exhibit L, p. 14). Dr. Pickering testified that Mr. Thomas progressed reasonably well after the procedure to the right knee and that he has not performed any other procedures to that knee (Exhibit L, p. 15). Mr. Thomas does have residual problems with his right knee that Mr. Thomas described as being located on the front and outside of the right knee (Exhibit L, p. 27). Mr. Thomas indicated that it was a dull pain that occurred with activity and ranked the pain as a two on a scale of ten (Exhibit L, pp. 27-28).

Dr. Pickering also treated Mr. Thomas's left knee that was injured in 1997. Dr. Pickering first saw Mr. Thomas with regard to his left knee in November of 1999 when Mr. Thomas complained of "a lot of recurrent pain and swelling in his left knee, with popping, was giving out, and had a lot of difficulty on stairs." (Exhibit L, p. 18). Dr. Pickering scheduled Mr. Thomas for a second arthroscopic procedure to his left knee because of a severe popping sensation on the outside of the knee that was extremely troublesome to Mr. Thomas (Exhibit L, pp. 18-19). Even after the second procedure to his left knee, Mr. Thomas has residual problems with his left knee. When Dr. Pickering last saw Mr. Thomas on October 14, 2000, Mr. Thomas indicated that he has more pain in his left knee than in his right knee (Exhibit L, p. 24). He rated the pain as a five out of ten (Exhibit L, p. 28). Mr. Thomas described the pain as dull and aching, and deep inside the knee, he indicated

that the knee hurts constantly with activity and even at rest (Exhibit L, pp. 28-29). Dr. Pickering has restricted Mr. Thomas to bench type work with a sit-stand option as a result of both knee problems (Exhibit K, p. 29). **Dr. Pickering testified within a reasonable degree of medical certainty that based upon the surgery he performed on the left knee (the original injury) in the year 2000, that Mr. Thomas's left knee would have prevented him from returning to his job with the railroad** (Exhibit L, p. 36).

Lastly, Dr. Jerome Ciullo, a shoulder specialist who treated Mr. Thomas, was deposed and testified regarding the condition of both of Mr. Thomas's shoulders. Dr. Ciullo performed an arthroscopic procedure to remove some bone spurs in Mr. Thomas's left shoulder on October 4, 1999 (Exhibit M, Deposition of Jerome Ciullo, M.D., pp. 7-9). Dr. Ciullo noted that Mr. Thomas did not have a rotator cuff tear on his left side (Exhibit M, p. 9). **Dr. Ciullo followed up with Mr. Thomas after the October 1999 procedure and testified that as of April 11, 2000 Mr. Thomas's left shoulder would not prevent him from working as a railroad conductor** (Exhibit M, pp. 9-12). Mr. Thomas had no restrictions with regard to his left shoulder as of April 2000 (Exhibit M, p. 22). At the time of Mr. Thomas's follow up visit on April 11, 2000, he complained that his right shoulder hurt to move, that it was weak, and that he felt restricted because of the prior procedure to his right shoulder that required 109 sutures. X-rays revealed a large bone spur on the right shoulder. Dr. Ciullo performed a combination arthroscopic and open procedure to remove the bone spur and repair a hole in the rotator cuff muscle (Exhibit M, pp. 16-18). **Dr. Ciullo indicated that the injury to Mr. Thomas's right shoulder was more serious than the injury to his left shoulder** (Exhibit M, p. 23).

ARGUMENT

I. THE COURT OF APPEALS ERRED IN CONCLUDING THAT DEFENDANT AUTO WAREHOUSING COMPANY FAILED TO RAISE A TRIABLE ISSUE OF FACT REGARDING THE REASONABLENESS OF PLAINTIFF GRAND TRUNK WESTERN RAILROAD'S ALLOCATION OF THE SETTLEMENT WITH TERRY THOMAS.

This application for leave should be granted to review the court of appeals' decision because the decision will cause material injustice to Defendant and is in conflict with this Court's decision in Maiden v Rozwood, 461 Mich 109, 118; 597 NW 2d 817 (1999). The trial court in this matter granted Plaintiff's Motion for Summary Disposition under MCR 2.116(C)(10). As this Court set forth in Maiden,

A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. In evaluating a motion for summary disposition brought under this subsection, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10), (G)(4). Quinto v Cross & Peters Co., 451 Mich 358, 547 NW2d 314 (1996).

Maiden v Rozwood at 120. Maiden further states that "[t]he court rule plainly requires the adverse party to set forth specific facts at the time of the motion showing a genuine issue for trial." Id. at 121.

The trial court determined that factual issues regarding Defendant's obligation to indemnify Plaintiff existed but that those issues and the reasonableness of the allocation of the settlement could not be presented to the trier of fact because Defendant refused Plaintiff's tender of defense (Exhibit H). After reversing the basis for the trial court's grant of summary disposition, the court of appeals ignored the trial court's finding that questions of fact existed and upheld the grant of summary

disposition based on Plaintiff's evidence that the settlement amount was reasonable. **The reasonableness of the allocation was never addressed by trial court.** The court of appeals relied on a statement from the facilitator and evidence from Thomas' economic expert to conclude that the settlement was reasonable. The court of appeals stated that "[a]lthough defendant argues a contrary view of allocation based on the nature of Thomas' injuries, defendant's arguments do not raise a triable issue of fact whether the settlement was reasonable." (Exhibit J, p. 9). It is highly debatable whether or not the statement from the facilitator that the settlement was reasonable is even admissible. The facilitator was appointed by the Court to attempt to resolve the controversy between the parties. **He was not appointed as an independent fact finder.** His opinions regarding the reasonableness of the settlement are irrelevant. Allowing the facilitator to even render an opinion in this matter would open the door to statements made by parties during the course of the facilitation proceedings. Obviously, this is not a door that any court in the State wants to open as it would have a chilling effect on alternative dispute resolution proceedings.

With regard to the evidence from Mr. Thomas' economic expert, this evidence merely calculated Mr. Thomas' potential lost wages. **The evidence did not have any probative value with regard to which injury caused the lost wages.** This evidence, when viewed against the medical evidence presented by Defendant, could not possibly cause any reasonable person to conclude that the allocation of the settlement in this matter between the 1997 and 1999 injuries was reasonable. The court of appeals' Opinion did not even address the evidence presented by Defendant let alone view the evidence presented by Defendant in a light most favorable to Defendant. The court of appeals decision in this matter is clearly erroneous.

The "contrary view" referenced by the court of appeals is the testimony from Mr. Thomas' treating physicians indicating that the 1997 injuries were more severe than the 1999 injuries. The court of appeals improperly weighed the credibility of the evidence presented by the parties to determine that the allocation of the settlement was reasonable. Maiden requires that the testimony submitted by Defendant regarding the severity of Mr. Thomas' injuries be viewed in the light most favorable to Defendant. Maiden at 120. As pointed out by Justice Wilder in his concurring and dissenting opinion:

In opposing summary disposition in the present case, defendant offered direct evidence of Thomas' injuries and his ability to recover from his injuries to contradict the opinion of the independent facilitator and Thomas' economic expert that damages were appropriately allocated in the amounts of \$100,000 for injuries suffered in 1997 and \$625,000 for his 1999 injuries.

Such direct and contradictory evidence precludes the grant of summary disposition pursuant to Maiden.

A. The evidence presented by Defendant created a question of fact that must be resolved by the trier of fact.

The Michigan published opinion most directly on point regarding the issues involved in this case is the consolidated opinion issued in Trim v Clark Equipment Co., 87 Mich App 270, 274 NW2d 33 (1978). The case consolidated with Trim for purposes of appeal was Ford v Clark Equipment Co., 87 Mich App 270, 278; 274 NW2d 33 (1978), which was referenced by court of appeals when citing to the opinion. This case demonstrates that the court of appeals erred in deciding factual issues pending in this matter.

Trim v Clark Equipment Co., 87 Mich App 270, 274 NW2d 33 (1978) holds that an indemnitee, who settles a claim against it before liability has been determined and after a tender of

defense, must show only potential liability in order to require the indemnitor to indemnify him for the settlement that has been paid out. Trim at 277. The court in Trim pointed out that “the ultimate burden of persuasion remains with the indemnitee to show that the settlement was reasonable under all the circumstances.” Id. at 277. The test to determine whether or not a settlement was reasonable involves two inquiries. The court of appeals set forth the following passage from Trim (identified as Ford by the court of appeals):

The reasonableness of the settlement consists of two components which are interrelated. The **fact finder** must look at the amount paid in settlement of the claim in light of the risk of exposure. The risk of exposure is the probable amount of a judgment if the original plaintiff were to prevail at trial, balanced against the possibility that the original defendant would have prevailed. If the amount of the settlement is reasonable in light of the **fact finder’s analysis** of these factors, the indemnitee will have cleared this hurdle.

Trim at 278. (Citations omitted) (Emphasis added). The foregoing passage establishes that the determination regarding the reasonableness of the allocation of the settlement must be made by the fact finder. This is further supported by the court’s statement in Dunn v Lederle Laboratories, 121 Mich App 73, 80; 328 NW2d 576 (1983), that “[r]easonableness is a question of fact.”

The above passage was also set forth in Fashion House v K Mart Corp., 892 F.2d 1076 (1st Cir. 1989), which was cited by the court of appeals. Fashion House v K Mart Corp., involved a claim for indemnification by K Mart against a jobber regarding a trademark infringement lawsuit. The court in Fashion House set forth the principles from Trim regarding the reasonableness of a settlement. Fashion House involved a directed verdict after the presentation of K Mart’s proofs at a jury trial. A portion of K Mart’s evidence regarding the reasonableness of the settlement was rejected by the trial court and a directed verdict was entered. The court of appeals held:

Because the directed verdict was premised on the district court's erroneous view of the law on contractual indemnity and its subsequent rejection of probative evidence bearing on the nature of the Guess? settlement, we are constrained to remand for a proper determination of FHI's liability to indemnify its vendee.

Fashion House, 892 F.2d at 1095.

In this case, the grant of summary disposition was premised on the trial court's erroneous view of Defendant's duty to defend, without consideration for the evidence presented by Defendant regarding the reasonableness of the allocation of the settlement. The court of appeals inappropriately weighed the evidence presented by Defendant regarding the reasonableness of the allocation of the settlement and concluded that Defendant's evidence did not present a triable issue of fact. Trim and Fashion House both set forth that it is the fact finder's responsibility to "look at the amount paid in settlement of the claim in light of the risk of exposure." Trim at 278; Fashion House at 1094. Just as the court in Fashion House remanded the matter for a proper determination of the claim for indemnity by the fact finder, this matter should be remanded to the trial court to allow a fact finder to assess the reasonableness of the allocation of \$625,000 to the 1999 accident based on the competing evidence presented by the parties.

B. The Payment of \$625,000 for the January 11, 1999 Incident was not Reasonable

As set forth above, all of the circumstances surrounding the settlement must be examined to evaluate the amount paid in settlement in light of the risk of exposure. Trim, at 278. The circumstances presented here involve both of Mr. Thomas's incidents and the injuries suffered in each incident must be considered when determining if the amount of the settlement is reasonable. Plaintiff has argued the issue of the reasonableness of the \$625,000 settlement as if the analysis takes place in a vacuum. This view is contrary to Trim and is unsupported. All the circumstances must

be reviewed and to simply ignore the structure of the settlement and the allocation between the incidents is illogical.

Both of Plaintiff's claims were settled for a total of \$725,000. The December 1997 incident was allocated \$100,000 and the January 11, 1999 incident was allocated \$625, 000. The decision to allocate over 85% of the money paid to settle Mr. Thomas's claims was made by Plaintiff and Plaintiff alone. It must be recalled that Plaintiff settled Mr. Thomas's claims immediately after Defendant refused to accept the defense of the January 11, 1999 incident at the facilitation that took place on May 29, 2001. **With full knowledge that it had a claim of indemnity against Defendant for the settlement paid for the January 11, 1999 incident and no claim for indemnity regarding the December 1997 incident, Plaintiff decided that it would allocate over 85% of the amount paid to settle the claim for which it could claim indemnity. The sheer discrepancy of the allocation screams bad faith on Plaintiff's part and when the nature of the injuries suffered in each of the incidents is considered, Plaintiff's allocation moves into the realm of absurdity.**

There is ample evidence that was presented to the trial court and court of appeals that the bulk of Mr. Thomas's damages are actually attributable to the December 29, 1997 accident. Although the trial court never considered this evidence prior to granting Plaintiff's summary disposition, the court of appeals compared the medical evidence against the statement of the facilitator and Mr. Thomas' expert witness and determined that Plaintiff's evidence outweighed Defendant's evidence which is discussed below.

In his December 29, 1997 accident, Mr. Thomas injured his left knee and right shoulder. In the January 11, 1999 incident, Mr. Thomas injured his right knee and left shoulder. With regard to the knee injuries, Mr. Thomas had surgery on his left knee to repair cartilage damage in 1998

(Exhibit K, p. 11). Dr. Pickering performed a second operation on Mr. Thomas's left knee in 1999 (Exhibit L, pp. 18-19). Plaintiff has only undergone one arthroscopic procedure on his right knee. Dr. Pickering testified that Mr. Thomas stated he had more pain in his left knee, which was rated as a five out of ten, than in his right knee, which was rated as a two out of ten (Exhibit L, pp. 24, 28-29). Mr. Thomas complained that his left knee hurt constantly (Exhibit L, pp. 28-29). **Lastly, Dr. Pickering testified that Mr. Thomas's injury to his left knee would have prevented him from performing his job duties as a railroad worker** (Exhibit L, p. 36). In sum, the 1997 incident caused a knee injury that has required two surgeries, causes constant pain, and would have disabled Mr. Thomas from his job, while the 1999 incident caused an injury that required a single procedure from which Mr. Thomas progressed well.

With regard to his shoulders, Mr. Thomas had rotator cuff surgery on his right shoulder in May of 1998 (Exhibit K, p. 10). When he was returned to work in 1998, he was under severe restrictions for his shoulder as a result of his shoulder injury and surgery (Exhibit K, pp. 15-16). Dr. Ciullo, a shoulder specialist who treated Mr. Thomas for injuries to both of his shoulders, performed a second surgery on Mr. Thomas's right shoulder to remove a bone spur and repair a hole in the rotator cuff muscle (Exhibit M, pp. 16-18). **Dr. Ciullo testified that the injuries to Mr. Thomas's left shoulder would not have prevented him from working as a railroad conductor and that he had no work restrictions with regard to his left shoulder** (Exhibit M, p. 9-12,22). Lastly, Dr. Ciullo testified that the injury to Mr. Thomas's right shoulder was more serious than the injury to his left (Exhibit M, p. 23). Thus, the 1997 incident resulted in two surgeries to treat bone spurs and torn muscles while the 1999 incident required only one procedure and would have allowed Mr. Thomas to return to work without restriction by April 2000.

In consulting with his physicians after his January 11, 1999 accident, Mr. Thomas never claimed that he aggravated the injuries which he had originally sustained in the December 29, 1997 fall (Exhibit K, p. 25).

From these proofs it is clear that the injuries sustained by Mr. Thomas in December 29, 1997 accident were more severe than those sustained in the January 11, 1999 accident. Despite this fact, Plaintiff allocated over 85% of the settlement to less severe injuries. At a minimum, the testimony of Mr. Thomas' physicians, when viewed most favorably to Defendant, presents a question of fact regarding the allocation of damages between the two accidents. In unilaterally sitting as a trier of fact with regard to the allocation of damages, Plaintiff and the court of appeals usurped the role of the fact finder. Further, it is clear that Plaintiff improperly and unjustifiably allocated the bulk of Mr. Thomas's damages to his 1999 injury.

The trial court failed to consider the foregoing evidence regarding the circumstances of the allocation of the settlement in granting Plaintiff summary disposition. The court of appeals weighed competing evidence to determine factual issues that should be decided by a trier of fact. When **all** of the circumstances surrounding the settlement are analyzed, as required by Trim, including the structure and amount of the settlement compared with Plaintiff's injuries in 1997 versus his injuries in 1999, a genuine issue of material fact exists as to whether or not the allocation of the settlement was reasonable. The burden of establishing reasonableness belongs to Plaintiff and for purposes of summary disposition, the facts must be viewed in light most favorable to Defendant. Maiden, supra. Moreover, the court held in Trim that whether or not the settlement was reasonable is an issue of fact that should be decided by the jury rather than the judge. Affirming the grant of summary disposition in Plaintiff's favor was error because the court of appeals failed to consider all of the circumstances

surrounding the allocation of the settlement and improperly decided the fact question of whether or not the allocation of the settlement was reasonable.

RELIEF REQUESTED

WHEREFORE, Defendant Auto Warehousing Company respectfully requests that this Honorable Court reverse the Court of Appeals' Opinion finding no issue of fact regarding the reasonableness of the settlement Plaintiff Grand Trunk Western Railroad, Inc., allocated to Terry Thomas' January 1999 fall and remand the issue regarding the reasonableness of the settlement to the Wayne County Circuit Court for trial on that issue.

Respectfully submitted,

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